

## FAIR WORK COMMISSION

### *Four yearly review of modern awards – Annual leave*

**AM2014/47**

#### **Submission on behalf of the Coal Mining Industry Employer Group**

##### **Introduction**

1. This submission is made in accordance with the directions issued by the Full Bench of the Fair Work Commission on 15 September 2015, following its decision issued on that day (the *September 2015 decision*) [2015] FWCFB 5771.
2. The Coal Mining Industry Employer Group (**CMIEG**) supports the variation of the Black Coal Mining Industry Award 2010 (**BCMI Award**) to incorporate the annual leave model terms as set out in the Draft Determination published by the Commission on 30 September 2015, except for the model term on excessive annual leave accruals (clause 25.13). The CMIEG submits that the model term for excessive annual leave accruals should not be incorporated in the BCMI Award for the reasons set out in this submission.
3. It is noted, at the outset, that the Commission has recognised that while it has a "provisional view" that "a model term dealing with the taking of annual leave should be consistently inserted in all modern awards..." it accepts "that some modern awards have particular leave provisions necessitating a degree of "tailoring" to the model term" (*June 2015 decision* [2015] FWCFB 3406 at [169] and [219]).

##### **Why the model term on excessive annual leave accruals should not be incorporated in the BCMI Award**

4. In summary, the reasons why the model term on excessive annual leave accruals should not be incorporated into the BCMI Award are as follows:
  - (a) The BCMI Award already includes clause 25.4 – "When annual leave can be taken", providing for the taking of annual leave at the instance of an employee and the employer. That provision has been a standard term of major awards for the black coal mining industry since at least 1997, and was included in the BCMI Award by consent. The clause continues to operate satisfactorily. Clause 25.4 provides a fair balance of rights of both the employee and the employer to cause the taking of

Lodged on behalf of:  
Address for Service:  
Ashurst Australia  
Level 11, 5 Martin Place  
Sydney NSW 2000

Coal Mining Industry Employer Group (CMIEG)  
Tel: (02) 9258 6025 / 6313  
Fax: (02) 9258 6666  
Email: adrian.morris@ashurst.com /  
trent.sebbens@ashurst.com  
Ref: AGM TZS 02 3000 0722

annual leave. There has been no previous contention by parties interested in the BCMI Award that clause 25.4 should be removed. Indeed, there has been an express acceptance by the CMIEG and the CFMEU that clause 25.4 should remain unchanged.

- (b) Including the model term on excessive annual leave (clause 25.13) would at the least cause confusion, if not give rise to apparently conflicting rights and obligations concerning the taking of annual leave. The draft clause 25.13 is simply unnecessary given the terms of the current clause 25.4 of the BCMI Award.
- (c) Including the model term on excessive annual leave would also be at odds with clause 25.10 – "Shutdown" of the BCMI Award in respect of which, again, there is no contention by parties interested in the BCMI Award the clause should be removed or altered.
- (d) There is no factual material suggesting that the matter of excessive annual leave has presented difficulties for employers or employees in the black coal mining industry. The CMIEG submits that there is no excessive annual leave management problem needing to be fixed by variation of the BCMI Award.
- (e) The current clauses 25.4 and 25.10 of the BCMI Award meet the practical operational needs of the mines at which they apply. Removing either clause would cause problems for employers and employees in a number of practical operational circumstances. For example, a direction to employees to take annual leave can occur when geological or geotechnical circumstances prevent work from being performed by a section or sections of a mine workforce, or where market or business considerations lead to a decision to suspend operations for a period.
- (f) Black coal mines generally operate on a continuous basis, 24 hours 7 days per week. The rostering of employees takes account of entitlements to take annual leave. It is commonly the case that the time at which employees take annual leave is a feature of the rosters. For example, shift crews generally plan well in advance the time at which each crew member will take planned annual leave during the coming calendar year. This is to ensure that minimum crew numbers are maintained. These arrangements are facilitated by the provisions of clause 25.4.
- (g) Employees covered by the BCMI Award, can be distinguished from employees covered by most other modern awards, by the fact that they are entitled to five or six weeks annual leave (clause 25.2) and long service leave, based on industry service, at the rate of 13 weeks for each 8 years of service (*Coal Mining Industry (Long Service Leave) Administration Act 1992 (Cth)*).
- (h) Employees who wish to "save up" leave, have the additional benefit of the comparatively generous long service leave entitlement that is able to be used for this purpose.

- (i) There is a high incidence of enterprise agreements in the black coal mining industry and, to the extent that there are concerns that the provisions of the BCMI Award may not be appropriate or sufficient in dealing with the taking of leave, those concerns can be addressed by an enterprise agreement.

5. We deal with each of these points further, below.

#### **Clause 25.4 - "When annual leave can be taken" of the BCMI Award**

6. Clause 25.4 of the BCMI Award provides:

25.4 When annual leave can be taken

- (a) An employee with an annual leave entitlement, who wishes to take all or part of that entitlement will, unless otherwise agreed between the employee and the employer, give the employer at least 28 days' notice in writing of the amount of leave to be taken. The employer will grant that leave unless, in the employer's opinion, the operations of the mine will be affected.
- (b) Unless otherwise agreed, annual leave will be taken within 12 months of the date the employee received the annual leave entitlement.
- (c) The employer may direct an employee to take all or part of an annual leave entitlement provided at least 28 days' notice in writing is given to the employee.

7. The clause is very similar to that included in The Coal Mining Industry (Production and Engineering) Consolidated Award 1997 (AP774609) (**1997 Award**) (clause 29.3). A clause in similar terms was also included in the Coal Mining Industry (Staff) Award 2004 (AP835164) (clause 26.3). The terms of those two major coal mining industry awards were subsequently incorporated in the BCMI Award when it was made. That is, their terms were used as the models for the BCMI Award.

8. Before the 1997 Award, clause 15(f)(2) of the Coal Mining Industry (Production and Engineering) Award, September 1990<sup>1</sup> (**1990 Award**) provided that an employee may give the employer four weeks' notice of the time at which the employee desired to take leave and was to be allowed unless the operations at the mine would be affected by the granting of leave. The Coal Mining Industry Interim Consent Award (Deputies & Shotfirers) 1990<sup>2</sup> (clause 14(f)), the Coal Mining Industry (Supervision and Administration) Interim Consent Award 1990, New South Wales and Tasmania<sup>3</sup>

---

<sup>1</sup> *United Mineworkers Federation of Australia; Federated Engine Drivers and Firemen's Association and Amalgamated Metal Workers; Union; Electrical Trades Union and Queensland Coal Association; New South Wales Coal Association; Cornwall Coal Company No Liability* [1990] ACIndT 4414 (23 November 1990)

<sup>2</sup> *Colliery Officials' Association of New South Wales and New South Wales Coal Association* [1990] ACIndT 4402 (3 September 1990); retained in similar terms in The Coal Mining Industry Award (Deputies and Shotfirers) 2002 (AP813783) (clause 17(f))

<sup>3</sup> *The Australian Collieries Staff Association and New South Wales Coal Association; Cornwall Coal Company No Liability* [1990] ACIndT 4419 (28 November 1990)

(clause 17(f)) and The Coal Mining Industry (Supervision and Administration) Interim Consent Award 1990, Queensland<sup>4</sup> (clause 17(f)), each contained similar clauses.

9. This clause had its origins in the Coal Mining Industry (Miners) Award, 1973, Queensland,<sup>5</sup> the Coal Mining Industry (Engine Drivers and Firemen's) Award, 1973, Queensland.<sup>6</sup>
10. Any removal of clause 25.4 and inclusion of the model term (clause 25.13) would remove the right of the employee to have leave granted in the manner provided in that clause, and an employee would be left only with the rights under the excessive leave clause, with the preconditions and limitations that imposes.
11. Since at least 1997, an employer has had the Award right to direct the taking of annual leave (clause 29.3.3 of the 1997 Award). There has been a symmetry between the rights of the employee and the employer to cause the taking of annual leave. There has not been, and there is no, evident problem in the operation of what is now clause 25.4, in actual practice.
12. Given these facts, it is reasonable to regard the provision of clause 25.4 as a well-established industry standard that meets the modern awards objective of providing a "fair and relevant minimum safety net of terms and conditions" and ensuring a "simple, easy to understand, stable and sustainable modern award system" (section 134(1) and (1)(g), *Fair Work Act 2009* (Cth) (**FW Act**); see also the object in section 3(b), FW Act).

#### **Conflict between excessive annual leave model term and current BCMI Award terms**

13. If, as the CMIEG contends and the Draft Determination (clause 25.13) assumes, clause 25.4 of the BCMI Award is retained, the model term for excessive leave is simply unnecessary. If excessive leave really is a problem requiring attention in a particular case, clause 25.4 enables both the employee and the employer concerned to deal with it. In the unlikely event of a dispute, that can be dealt with under the dispute resolution procedure in the BCMI Award (clause 9).
14. Given the retention of clause 25.4, if the model term (clause 25.13) is included, there will be apparent inconsistency between the rights and obligations of the employee and the employer in clause 25.4, in the terms in which they are expressed, and the rights and

---

<sup>4</sup> *The Australian Collieries Staff Association and Queensland Coal Association* [1990] ACIndT 4418 (28 November 1990)

<sup>5</sup> *The Australian Coal and Shale Employees' Federation; the Amalgamated Metal Workers and Shipwrights Union; the Electrical Trades Union of Australia; the Federated Mining Mechanics Association; the Federated Engine Drivers and Firemen's Association and New South Wales Combined Colliery Proprietors Association; Queensland Coal Owners Association* [1980] ACIndT 2826 (12 June 1980); *The Australian Coal and Shale Employees' Federation and the Queensland Coal Owners' Association* [1980] ACIndT 2854 (23 July 1980)

<sup>6</sup> *The Australian Coal and Shale Employees' Federation; the Federated Engine Drivers and Firemen's Association of Australasia; the Amalgamated Metal Workers' Union; the Electrical Trades Union of Australia; the Federated Mining Mechanics Association and New South Wales Combined Colliery Proprietors Association; Queensland Coal Owners' Association; the Cornwall Coal Company No Liability* [1980] ACIndT 2766 (14 January 1980); *The Federated Engine Drivers and Firemen's Association of Australasia and Queensland Coal Owners' Association* [1980] ACIndT 2870 (31 July 1980)

obligations of the employee and the employer under the model term (clause 25.13), with the preconditions and limitations on the exercise of the rights of the employer and employee under the model term.

15. For example, the model term rights are triggered only when an employee has an excessive leave accrual, and the leave which can be required to be taken is limited. In contrast, under clause 25.4 either the employee or the employer may cause leave to be granted or taken regardless of the leave accrued, and without limitation as to the amount of leave that may be granted or taken.
16. Accordingly, the inclusion of the model term in the BCMI Award would not meet the modern awards objective of being "simple" and "easy to understand" (section 134(1)(g), FW Act).

#### **Clause 25.10 – "Shutdown" of the BCMI Award**

17. Clause 25.10 of the BCMI Award provides:

##### 25.10 Shutdown

- (a) An employer that shuts down all or any part of its operation must give employees at least 28 days' notice of the shutdown or such shorter period as agreed between the employer and the employees affected.
  - (b) Employees directly affected by the shutdown who have an entitlement to annual leave may take all or part of that entitlement during the shutdown period.
  - (c) Employees who are directly affected by the shutdown and who are not yet entitled to sufficient annual leave may, during the shutdown period, take any annual leave accrued in accordance with clause 25.9.
18. There is a clear alignment between the operation of clauses 25.4 and 25.10 of the BCMI Award. For example, in the event of a shutdown an employee may take all or part of his or her annual leave entitlements during the shutdown. It is hard to see how an employer could decline to grant an employee annual leave on the basis that the operation of the mine will be affected, by the employee taking leave when the operation in which the employee works is shutdown. Likewise, an employer could ordinarily reasonably direct an employee to take all or part of his or her annual leave during a shutdown by giving the 28 days' notice required under clause 25.4(c). The 28 day period of notice required by the employee and the employer under clause 25.4 is the same as the notice of a shutdown required under clause 25.10.
19. In a way similar to the inconsistency between clause 25.4 and the model term, there would be an inconsistency between the rights and obligations under the model term and clause 25.10.

20. The inclusion of the model term would create difficulties in relation to the construction, and in its interaction with the operation of clause 25.10. For example, under clause 25.10 an employee may elect to take annual leave during a shutdown, in advance of an accrual. Under model term (clause 25.13), however, an employer would not be required to grant an employee's annual leave if the employee did not have excessive leave and the granting of leave would result in the employee's accrual being less than six weeks.
21. A shutdown clause, in similar terms to that in clause 25.10, has operated satisfactorily in black coal mining industry awards since 1997, being contained in the 1997 Award (clause 29.11), and the 1990 Award (clause 15(k), which provided for a shutdown on the giving of four weeks' notice). The shutdown clause had its origin in the Coal Mining Industry (Miners) Award, 1973, Queensland,<sup>7</sup> and the Coal Mining Industry (Engine Drivers and Firemen's) Award, 1973, Queensland.<sup>8</sup>
22. There is no evident difficulty in the operation of the shutdown clause in practice. There has been no contention by the major industry parties that the clause should be removed or altered. It is noted that the Commission has previously stated:
- "The provisions in awards and NAPSAs governing annual close-downs vary significantly. It is preferable that we do not alter provisions which have been specifically developed for particular industries."<sup>9</sup>
23. Accordingly, the inclusion of the model term would, once again, not be consistent with the modern awards objective that modern awards be "simple" and "easy to understand" (section 134(1)(g), FW Act).

**No factual material suggesting any excessive annual leave accrual difficulties in the black coal mining industry**

24. There is no factual material suggesting that the matter of excessive annual leave accrual has presented difficulties for employers or employees in the black coal mining industry. The CMIEG submits that there is no excessive annual leave management problem needing to be fixed by variation of the BCMI Award.
25. This point needs no elaboration.

**Practical operational needs of black coal mines are met by clauses 25.4 and 25.10 of the BCMI Award**

26. There are a number of practical operational exigencies affecting black coal mines that are met by the current clauses 25.4 and 25.10 of the BCMI Award.

---

<sup>7</sup> *Ibid*, footnote 5

<sup>8</sup> *Ibid*, footnote 6

<sup>9</sup> [2008] AIRCFB 1000 at [97], cited in the June 2015 decision [2015] FWCFB 3406 at [375]

27. Some examples of these are as follows:
- (a) Geological or geotechnical circumstances may require that one or more sections of a mine cease operation for a period. As a result, if coal is not being produced, part of the mining workforce and the employees operating the coal handling and preparation plant at the mine may have no useful work for a period. In these circumstances, the employer or the employee may sensibly see the taking of annual leave as the best course. The alternative of standing down employees without pay may be available but would be onerous and reasonably avoided by the granting and taking of annual leave.
  - (b) There have been instances where mines have had to stop because of a underground longwall shearing machine being put out of action by being buried due to the collapse of the strata in the coal seam. This is another circumstance in which the taking of leave in accordance with clause 25.4 of the BCMI Award, at the instance of the employee or employer, is reasonable and practicable while the longwall shearing machine is recovered.
  - (c) Market considerations including the cyclical nature of black coal markets, may cause a mine operator to choose to shut down all or part of an operation for a period. A prime recent example of this was the shutting down of a number of Glencore group mines for a three week period in December 2014 and January 2015, due to oversupply of coal in the market.<sup>10</sup> Such action can be distinctly beneficial to employees, in so far as it may mitigate the need for an employer to reduce workforce numbers through retrenchment.
  - (d) Another circumstance that can arise is that the product coal stockpile at a mine reaches full capacity, and the extraction of coal therefore needs to be stopped or slowed. In these circumstances, an employee or employer may exercise rights under clause 25.4 (or clause 25.10).
28. In each example situation, clauses 25.4 and 25.10 meet the reasonable needs of employees and employers in the black coal mining industry. Inclusion of the model term and removal of either clause 25.4 or 25.10, would be less beneficial. These terms of the BCMI Award are already "mutually beneficial" (see *June 2015 decision* [2015] FWCFB 3406 at [214]; *September 2015 decision* [2015] FWCFB 5771 at [175]).
29. Accordingly, the inclusion of the model term would not be consistent with the modern awards objective that, in making modern awards, the Commission take into account "the need to promote flexible modern work practices..." and "the likely impact of any exercise

---

<sup>10</sup> See Glencore Media Statement, "Glencore temporary coal production shutdowns in Australia", 14 November 2014 (<http://www.glencore.com/assets/media/doc/news/2014/Media-statement-Glencore-announces-temporary-coal-production-shutdowns....pdf>)

of modern award powers on business, including productivity, employment costs and regulatory burden" (section 134(1)(c) and (f), FW Act).

### **Annual leave planning in the black coal mining industry**

30. Black coal mines generally operate on a continuous basis, 24 hours 7 days per week. The rostering of employees takes account of entitlements to take annual leave. It is commonly the case that the time at which employees take annual leave is a feature of the rosters. For example, shift crews typically plan well in advance the time at which each crew member will take planned annual leave during the coming calendar year. This is to ensure that minimum crew numbers are maintained. These arrangements are facilitated by the provisions of clause 25.4.
31. There is no need for elaboration of this point.

### **Distinguishing employee leave entitlements in the black coal mining industry**

32. Employees covered by the BCMI Award, can be distinguished from employees covered by most other modern awards, by the fact that they are entitled to five or six weeks annual leave (clause 25.2) and long service leave, based on industry service (that is portable), at the rate of 13 weeks for each 8 years of service (*Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth)).
33. There is no need for elaboration of this point.

### **"Saving up" leave for a longer break is adequately dealt with in the black coal mining industry**

34. A significant consideration taken into account by the Commission in its *June 2015 decision* [2015] FWCFB 3406 was that some employees choose deliberately to "save up" annual leave in order to be able to take a longer break.<sup>11</sup> Some employees in the black coal mining industry do this with the cooperation of their employer. There is no evidence of employees being thwarted in this respect.
35. An additional material consideration in the case of employees in the black coal mining industry is that they enjoy the benefits of a legislated industry service (ie. portable) long service leave scheme.<sup>12</sup> Under this scheme employees are entitled to the equivalent of 13 weeks leave for each 8 years of service. Therefore, an employee who wishes to save up a period of paid leave to take an extended break from work, can also access their long

---

<sup>11</sup> See, for example, *June 2015 decision* [2015] FWCFB 3406 at [175] (and also [141]-[143], [180], referring to Skinner, N and Pocock, B (2013) *Paid Annual Leave in Australia: Who gets it, who takes it and implications for work-life balance*, Journal of Industrial Relations, 21 August 2013, Vol 55, p 82 at p 686); see also the *September 2015 decision* [2015] FWCFB 5771 at [53] and [138]

<sup>12</sup> Established by the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth), *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* (Cth) and the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth), as administered by the Coal Mining Industry (Long Service Leave Funding) Corporation



service leave entitlement sooner than most employees under other modern awards in other industries or occupations, and for a longer period.

36. Under the *Coal Mining Industry (Long Service Leave) Administration 1992* (Cth) (section 37AB), where an employee who is entitled to long service leave applies to his employer to take a period of leave, the employer may refuse to grant the period of leave only on reasonable business grounds. Under section 37D, the Commission may deal with a dispute over the taking of leave, as if the dispute were a dispute in relation to the National Employment Standards.

**Enterprise agreements in the black coal mining industry**

37. There is a high incidence of enterprise agreements in the black coal mining industry and, to the extent that there are concerns that the provisions of the BCMI Award are not appropriate or sufficient in dealing with the taking of leave, those concerns can be addressed by an enterprise agreement.

38. This point needs no further elaboration.

**Adrian Morris**

Partner

**Trent Sebbens**

Counsel

26 October 2015